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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 181218999-9208-01]

RIN 0648-BI67

Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2019 Tribal Fishery for Pacific Whiting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule for the 2019 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan, the Magnuson-Stevens Fishery Conservation and Management Act, and the Pacific Whiting Act of 2006. This proposed rule would allocate 17.5 percent of the U.S. Total Allowable Catch of Pacific whiting for 2019 to Pacific Coast Indian tribes that have a treaty right to harvest groundfish. It would also amend the provisions regarding reapportionment of the treaty tribes' whiting allocation to the non-treaty sectors to require that NMFS consider the level of Chinook salmon bycatch when determining whether to reapportion

whiting. This rule is necessary to manage the Pacific whiting stock to Optimal Yield, ensure that the Pacific Coast Groundfish Fishery Management Plan (FMP) is implemented in a manner consistent with treaty rights of four treaty tribes to fish for Pacific whiting in their "usual and accustomed grounds and stations" in common with non-tribal citizens, and to protect salmon stocks listed under the Endangered Species Act.

DATES: Comments on this proposed rule must be received no later than *[Insert date 15 days after date of publication in the FEDERAL REGISTER]*.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2019-0001 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0001 click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- *Mail:* Aja Szumylo, Sustainable Fisheries Division, West Coast Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be

posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Miako Ushio, phone: 206-526-4644, and e-mail: *Miako.Ushio@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This proposed rule is accessible via the Internet at the Office of the Federal Register Web site at <https://www.federalregister.gov>. Background information and documents are available at the NMFS West Coast Region Web site at http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific_whiting.html and at the Pacific Fishery Management Council's website at <http://www.pcouncil.org/>.

Background: Tribal Allocations

The regulations at 50 CFR 660.50(d) outline the procedures for implementing the treaty rights that Pacific Coast treaty Indian tribes have to harvest groundfish in their usual and accustomed fishing areas in U.S. waters. Tribes with treaty fishing rights in the area covered by the Pacific Coast

Groundfish FMP request allocations, set-asides, or regulations specific to the tribes during the Pacific Fishery Management Council's (Council) biennial harvest specifications and management measures process. The regulations state that the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

Since the FMP has been in place, NMFS has allocated a portion of the U.S. Total Allowable Catch (TAC) of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

There are four tribes that can participate in the tribal Pacific whiting fishery: the Hoh Tribe, the Makah Tribe, the Quileute Tribe, and the Quinault Indian Nation (collectively, the "Treaty Tribes"). Tribal allocations have been based on discussions with the Tribes regarding their intent for those fishing years. The Hoh Tribe has not expressed an interest in participating to date. The Quileute Tribe and Quinault Indian Nation have expressed interest in beginning to participate in the Pacific whiting fishery at a future date. To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting, and has harvested Pacific whiting since 1996 using midwater

trawl gear. Table 1 below provides a history of U.S. TACs and annual tribal allocation in metric tons (mt).

Table 1. U.S. Total Allowable Catch and Annual Tribal Allocation in Metric Tons (mt).

<u>Year</u>	<u>U.S. TAC ^{1/}</u>	<u>Tribal Allocation</u>
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt
2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt
2012	186,037 mt	48,556 mt
2013	269,745 mt	63,205 mt
2014	316,206 mt	55,336 mt
2015	325,072 mt	56,888 mt
2016	367,553 mt	64,322 mt
2017	441,433 mt	77,251 mt
2018	441,433 mt	77,251 mt

/1 Beginning in 2012, the United States started using the term Total Allowable Catch, or TAC, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. Prior to 2012, the terms Optimal Yield (OY) and Annual Catch Limit (ACL) were used.

In 2009, NMFS, the states of Washington and Oregon, and the Treaty Tribes started a process to determine the long-term tribal allocation for Pacific whiting. However, these groups have not yet determined a long-term allocation. In order to

ensure Treaty Tribes continue to receive allocations, this rule proposes the 2019 tribal allocation of Pacific whiting. This is an interim allocation not intended to set precedent for future allocations.

Tribal Allocation for 2019

In exchanges between NMFS and the Treaty Tribes during September 2018, the Makah Tribe indicated their intent to participate in the tribal Pacific whiting fishery in 2019 and requested 17.5 percent of the U.S. TAC. The Quinault Indian Nation and Quileute Indian Tribe both informed NMFS in December 2018 that they will not participate in the 2019 fishery. The Hoh Indian Tribe has in previous years indicated in conversations with NMFS that they have no plans to fish for whiting in the foreseeable future and will contact NMFS if that changes. NMFS will contact the Tribes during the proposed rule comment period to refine the 2019 allocation before allocating the final U.S. TAC between the tribal and non-tribal whiting fisheries. NMFS proposes a tribal allocation that accommodates the Makah Tribe's request, specifically 17.5 percent of the U.S. TAC. NMFS has determined that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock indicates the 17.5 percent is within the range of the tribal treaty right to Pacific whiting.

The Joint Management Committee, which was established pursuant to the Agreement between the United States and Canada on Pacific Hake/Whiting (the Agreement), is anticipated to recommend the coastwide and corresponding U.S./Canada TACs no later than March 25, 2019. The U.S. TAC is 73.88 percent of the coastwide TAC. Until this TAC is set, NMFS cannot propose a specific amount for the tribal allocation. The Pacific whiting fishery typically begins on May 15, and we expect to publish the final rule to set Pacific whiting specifications for 2019 by early May. Therefore, to allow for public input on the tribal allocation, NMFS is issuing this proposed rule without the final 2019 TAC.

To provide a basis for public input, NMFS is describing a range of potential tribal allocations in this proposed rule. We applied the proposed tribal allocation of 17.5 percent to the range of U.S. TACs over the last 10 years, 2009 through 2018 (plus or minus 25 percent to capture variability in stock abundance). The range of U.S. TACs in that time period was 135,939 mt (2009) to 441,433 mt (2017 and 2018). Applying the 25 percent variability results in a range of potential TACs of 101,954 mt to 551,791 mt for 2019. Using the proposed tribal allocation of 17.5 percent, the potential range of the tribal allocations for 2019 would be between 17,842 mt and 96,563 mt.

Consideration of Chinook Salmon Bycatch before Reapportioning Tribal Whiting

Chinook salmon, including some listed as threatened under the Endangered Species Act (ESA), are caught as bycatch in the Pacific whiting fishery. The potential effects of this has been considered numerous times in NMFS' ESA section 7(a)(2) biological opinions. Most recently, on December 11, 2017, NMFS completed an ESA section 7(a)(2) biological opinion on the effects of the Pacific Coast Groundfish FMP (which manages 90+ species, including Pacific whiting) on salmonids. Term and Condition 2c of the biological opinion states: *No later than May 15th, 2019, NMFS will amend the provisions regarding reapportionment of the treaty tribes' whiting allocation to the non-treaty sectors to require that NMFS consider the level of Chinook bycatch when determining whether to reapportion whiting.* This proposed rule would amend the Pacific Coast Groundfish fishery regulations to require this consideration. The purpose of this action is twofold. First, the regulatory changes would minimize impacts to Chinook salmon from the whiting fishery. Reapportioning whiting that would not otherwise be used allows the non-tribal whiting fishery to continue fishing, thereby potentially impacting Chinook salmon, which occurs as bycatch in that fishery. The second purpose is to protect the treaty rights of the tribes, by preventing a reapportionment of Pacific

whiting that could cause the entire whiting fishery to close via automatic action measures outlined at § 660.60(d)(v), thereby limiting the tribal whiting fishery's opportunity to harvest their allocation.

Many factors could potentially be considered when determining a reapportionment's effect on listed Chinook salmon, including the status of Chinook salmon stocks caught in the whiting fishery, and location of the bycatch. However, the inseason data available about these factors is limited. In this action, NMFS proposes to require consideration of Chinook salmon bycatch rates and numbers prior to reapportioning tribal whiting. This consideration is required by NMFS' ESA and tribal obligations. NMFS requests comments on this approach.

This proposed rule would be implemented under authority of section 305(d) of the Magnuson-Stevens Act. With this proposed rule, NMFS, acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of four Treaty Tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. 1974).

NMFS notes that the public comment period for this proposed rule is 15 days. As a result of delays in this rulemaking related to the recent lapse in appropriations and the requirements to amend reallocation provisions and announce

Pacific whiting harvest guidelines by the Pacific whiting season start date, May 15th, NMFS has determined that a 15-day comment period best balances the interest in allowing the public adequate time to comment on the proposed measures while implementing the management measures and announcing the Pacific whiting allocations by May 15th.

Classification

NMFS has preliminarily determined that the management measures for the 2019 Pacific whiting tribal fishery are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making the final determination, NMFS will take into account the data, views, and comments received during the comment period.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

As required by section 603 of the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was prepared. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from NMFS.

Under the RFA, the term "small entities" includes small businesses, small organizations, and small governmental

jurisdictions. The Small Business Administration has established size criteria for entities involved in the fishing industry that qualify as small businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$11 million for all its affiliated operations worldwide (see 80 FR 81194, December 29, 2015). A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. For purposes of rulemaking, NMFS is also applying the seafood processor standard to catcher processors because Pacific whiting Catcher-Processors (C/Ps) earn the majority of the revenue from processed seafood product.

This proposed rule would affect how Pacific whiting is allocated to the following sectors/programs: Tribal, Shorebased Individual Fishing Quota (IFQ) Program Trawl Fishery, Mothership (MS) Coop Program—Whiting At-sea Trawl Fishery, and C/P Coop

Program-Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the U.S. TAC.

We expect one tribal entity to fish in 2019. Tribes are not considered small entities for the purposes of RFA. Impacts to tribes are nevertheless considered in this analysis. As of January 2019, the Shorebased IFQ Program is composed of 174 Quota Share permits/accounts (136 of which were allocated whiting quota pounds), 128 vessel accounts (57 of which have received an initial transfer of whiting quota pounds) and 42 first receivers, three of which are designated as whiting-only receivers and 11 that may receive both whiting and non-whiting. These regulations also directly affect participants in the MS Coop Program, a general term to describe the limited access program that applies to eligible harvesters and processors in the MS sector of the Pacific whiting at-sea trawl fishery. This program currently consists of six MS processor permits, and a catcher vessel fleet currently composed of a single coop, with 34 Mothership/Catcher Vessel (MS/CV) endorsed permits (with three permits each having two catch history assignments). These regulations also directly affect the C/P Coop Program, composed of 10 C/P endorsed permits owned by three companies that have formed a single coop. These co-ops are considered large entities from several perspectives; they have participants that are large entities, and have in total more than 750 employees worldwide

including affiliates. Although there are three non-tribal sectors, many companies participate in two sectors and some participate in all three sectors. As part of the permit application processes for the non-tribal fisheries, based on a review of the Small Business Administration size criteria, permit applicants are asked if they considered themselves a "small" business, and they are asked to provide detailed ownership information. Data on employment worldwide, including affiliates, are not available for these companies, which generally operate in Alaska as well as the West Coast and may have operations in other countries as well. NMFS has limited entry permit holders self-report size status. For 2019, all ten CP permits reported they are not small businesses, as did nine mothership catcher vessels and one shorebased catcher vessel. After accounting for cross participation, multiple QS account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered "small" businesses.

This rule will allocate fish between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests may be delivered to both shoreside plants and

motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportionment process. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2018 NMFS reapportioned 40,000 mt of the original 77,251 mt tribal allocation. This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. The reapportioning process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2018 following the reapportionment were: Tribal 37,251 mt, C/P Coop 136,912 mt; MS Coop 96,644 mt; and Shorebased IFQ Program 169,127 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the U.S. is exported. The U.S. Pacific whiting TAC is highly variable, as have subsequent harvests and ex-vessel revenues. For the years 2014 to 2018, the total Pacific whiting fishery (tribal and non-tribal) averaged harvests of approximately

267,400 mt annually. The 2018 U.S. non-tribal fishery had a catch of almost 318,000 mt, and the tribal fishery landed approximately 6,000 mt.

Impacts to Makah catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2018 average shoreside ex-vessel price of Pacific whiting, which was \$165 per mt. At that price, the proposed 2019 tribal allocation (potentially 17,842 - 96,563 mt) would have an ex-vessel value between \$2.9 million and \$15.9 million.

NMFS considered two alternatives for this action: the "No-Action" and the "Proposed Action." NMFS did not consider a broader range of alternatives to the proposed allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting. Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5 percent, as requested by the Tribes. This would yield a tribal allocation of between 17,842 and 96,563 mt for 2019. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels

requested by the Tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the no-action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no-action alternative would result in no allocation of Pacific whiting to the tribal sector in 2019, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the tribes' treaty rights. Given that there is a tribal request for allocation in 2019, this alternative received no further consideration.

While the reapportionment consideration of Chinook bycatch may negatively impact both large and small entities in the event of a high bycatch year, there are no alternatives identified that would be consistent with the applicable ESA statute that would also minimize any significant economic impact of the proposed rule on small entities.

NMFS believes this proposed rule would not adversely affect small entities. The reapportioning process allows unharvested tribal allocations of Pacific whiting, fished by small entities,

to be fished by the non-tribal fleets, benefitting both large and small entities. NMFS has prepared an IRFA and is requesting comments on this conclusion. See **ADDRESSES**.

There are no reporting, recordkeeping or other compliance requirements in the proposed rule.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Consistent with the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Fishery Management Council is a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, NMFS has coordinated specifically with the tribes interested in the Pacific whiting fishery regarding the issues addressed by this rule.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian Fisheries.

Dated: March 11, 2019.

Chris Oliver,

Assistant Administrator for Fisheries,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660--FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.50, revise paragraph (f)(4) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(4) *Pacific whiting*. The tribal allocation for 2019 will be 17.5 percent of the U.S. TAC.

* * * * *

3. Amend § 660.131 by revising paragraph (h)(4) and adding (h)(5) to read as follows:

§ 660.131 Pacific whiting fishery management measures.

*** * * * ***

(h) * * *

(4) Estimates of the portion of the tribal allocation that will not be used by the end of the fishing year will be based on the best information available to the Regional Administrator.

(i) *Salmon bycatch*. This fishery may be closed through automatic action at §660.60(d)(1)(v) and (vi).

(ii) [Reserved]

(5) Prior to reapportionment, NMFS will consider Chinook salmon take numbers and bycatch rates in each sector of the Pacific whiting fishery, in order to prevent a reapportionment that would limit Pacific Coast treaty Indian Tribes' access to the tribal allocation by triggering inseason closure of the Pacific whiting fishery as described at §660.60(d)(1)(v).

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